FOR THE DEFENSE

The Newsletter for the
Maricopa County Public Defender's Office

Volume 1, Issue 3 -- June, 1991

Dean W. Trebesch,
Maricopa County Public Defender

Contents:

And They're Off . . .

by Diane J. Terribile

On July 1, the *Client Services Program* staff will begin accepting referrals from attorneys of all trial groups. For convenience, the Client Services Coordinators are temporarily located in two areas of the Luhrs Building. Margi Breidenbach and Kevin Pollins are in offices on the fifth floor. Peggy Simpson and Pam Davis are in offices on the eighth floor. They will remain at these locations until they become more familiar with the program, the office and the attorneys. Each of the four Coordinators will be assigned to a trial group as the program progresses.

During their first few weeks with the office, the Client Service Coordinators are working together to expand their knowledge of available sentencing options and to increase their contacts in the treatment community. They are participating in training, attending court hearings and visiting various programs throughout the valley. The Coordinators have produced a handout which lists 32 of the Valley's treatment programs to be provided to attorneys and clients. They are also developing a treatment resource manual which will be made available to all Public Defender employees.

Coordinators will be available to perform a wide range of functions. They can discuss sentencing options with the attorneys. They can interview clients, assess client needs and help the attorney collect mitigating information. Coordinators can prepare clients for sentencing. They can make referrals to or arrange intakes for suitable treatment programs. In addition, Coordinators, at the request of the attorney, can assist during plea negotiations, presentence investigations and sentencings.

Conceivably, a Client Service Coordinator's workload can become overwhelming. To avoid jeopardizing their value and credibility, we have developed screening criteria and procedures for assignment. Attorneys are responsible for timely screening of appropriate referrals. They must obtain the supervisor's approval before a case can be assigned to a Coordinator.

A detailed description of the screening criteria and procedures for assignment is being distributed during the June trial group meetings. Anyone unable to attend that meeting can obtain a packet by contacting Teresa Campbell at 495-8200. Since this is a new project and details are subject to modification, all comments, suggestions or questions about the *Client Services Program* are welcomed. They can be directed to me at 495-8234.

What You Don't Ask May Hurt You

by Michael Walz

The composition of your jury can often mean the difference between conviction and an acquittal. Yet we are often faced with exercising our preemptory challenges armed with little or no information on juror's attitudes towards important issues in the case. All too often the judge asks a series of very suggestive and leading questions, where the "correct" answer is obvious. Attorney voir dire is highly preferable, but few judges are willing to permit it. How can we make voir dire a useful means to increase our chances of success? Consider the following suggestions.

(cont. on pg. 2)

1) Submit defendant's requested voir dire in a timely manner. Obviously failure to comply with Local Rule 4.11 requiring voir dire to be submitted 24 hours prior to trial can preclude the court's consideration of your voir dire. Early submission allows the court time to make a reasoned decision as well as demonstrates that you are a well-prepared, professional attorney. This never hurts.

2) Submit only those questions having a direct bearing on the issues in your case. Inundating the court with 60 questions dilutes the importance of the crucial questions. The fewer submitted, the more likely the court is to ask them. "Moving the trial along" is often a high priority. Consider allowing the court to dispense with the standard voir dire and ask only the questions you have submitted.

3) Submit non-suggestive questions worded such that they can reasonably be answered either "yes" or "no", or with a short response. Research has demonstrated that jurors are greatly intimidated by the courtroom setting and want to provide the "correct" answer to voir dire questions. The more jurors talk, the more likely you are able to glean their true feelings. However, tradition in Maricopa County seems to be to only ask questions that can be answered "yes" or "no". Given that limitation, structure your questions such that there will likely be a difference of opinion voiced by the jurors. Rather than "Does anyone believe they could not follow the law as it relates to drunk driving?" try "How many people think it should be against the law to drive after a person has consumed two beers?".

4) Accompany your questions with a short memorandum on Arizona law and why each of your questions is appropriate.

Rule 18.5(d) of the Arizona Rules of Criminal Procedure states "the court shall conduct voir dire examination, putting to the jurors all appropriate questions requested by counsel", (emphasis added). It has been held "this rule is an expression of the minimum due process required to insure a fair trial". State v. Chaney, 141 Ariz. 295, 686 P.2d 1265, 1273 (1984). Citing Chaney the Supreme Court stated, "We believe that, in the future, trial courts should broaden their inquiry to extend beyond the minimum due process demands" of Rule 18.5(d) State v. Mauro, 149 Ariz. 24, 716 P.2d 393, 397 (1986). Appropriate questions are those calculated to allow counsel to intelligently exercise their peremptory challenges and are not limited to discovering challenges for cause. State v. McDaniel, 136 Ariz. 188, 665 P.2d 70 (1983); State v. McMurtrey, 136 Ariz. 93, 664 P.2d 637 (1983). Questions are inappropriate if they are argumentative. This poses no obstacle to the astute attorney who realizes that securing a commitment in the courtroom does little towards securing an acquittal in the jury room. You are not going to change lifelong attitudes during a three day trial. Find out who these people are and whether you can communicate your case to them.

5) If the court refuses to ask each of your voir dire questions, require the court to state, on the record, the reasons why each question is not appropriate. Faced with an appeal issue which could be easily eliminated, the court may reconsider its position. Since Arizona courts have equated appropriate voir dire questions with due process, you could prevail on appeal.

Some sample questions:

1) How many people believe that the drug problem is the number one problem facing America?

2) How many people think it is more likely for a black person to be guilty of a drug offense than a white person?

3) How many people own handguns?

4) How many people drink alcoholic beverage?

DNA Testing Ruled Partly Inadmissible

On April 15, 1991, following a hearing that included the testimony of four expert witnesses and the depositions of two others, Judge B. Michael Dann ruled in State v. Hale that evidence regarding DNA testing done by the FBI was only partly admissible. The State's request to admit all of the proposed testimony resulting from DNA testing was denied in part and granted in part. The defendant was charged with first degree murder, sexual assault and burglary, and was represented by Roland Steinle of our office.

DNA profiling evidence is used to link a criminal suspect to body-fluid stains associated with the offense. DNA (deoxyribonucleic acid) is the complex molecule which contains the genetic blueprint for the physical structure and operation of all living things. It is found in all nucleated cells. Except for identical twins, no two individuals have identical DNA.

To compare the DNA in biological materials (such as blood or semen) that may be found at a crime scene to the DNA of a suspect, the FBI and two other private companies (Cellmark and Lifecodes) use a technique called Restriction Fragment Length Polymorphism (RFLP) testing. The RFLPs distinctive patterns are used to compare the individual origins of blood and semen samples.

When DNA evidence first started to be used by the government, many defense lawyers were either unwilling or unprepared to challenge its findings. Hence, many early cases across the nation were slam dunks for the government.

(cont. on pg. 3)

FOR THE DEFENSE

Editor: Christopher Johns, Training Director
Assistant Editors: Georgia A. Bohm and Teresa Campbell
Appellate Review Editor: Robert W. Doyle

Office: (602) 495-8200
132 South Central Avenue, Suite 6
Phoenix, Arizona 85004

FOR THE DEFENSE is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean W. Trebesch, Public Defender. **FOR THE DEFENSE** is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 10th of each month.

However, in the last two years and particularly in the last year, criminal defense lawyers have been mounting challenges, nationally and locally, to DNA evidence based upon whether it is generally accepted in the scientific community, as well as upon the grounds that the process in any given case may have been improperly conducted.

Besides Steinle's case, other recent cases include State v. Despain (Tucson defense attorney Joe Sotello won a complete victory in Yuma County in February precluding all DNA evidence) and State v. McComb (Phoenix defense attorney Carmen Fischer obtained a similar ruling as Hale from Maricopa County Judge Paul Katz in March following an extensive hearing).

In State v. Hale, Judge Dann found that DNA testing evidence or typing for forensic purposes has gained general acceptance in the relevant scientific communities, i.e., evidence of a DNA match may be introduced at trial. However, as Judge Katz also ruled in State v. McComb, the procedures for calculating the statistical probabilities of a random match are not generally accepted in the relevant scientific community and therefore are inadmissible at trial. While many courts have taken an all or nothing approach, that is, both issues must be admissible before any DNA evidence comes in at trial, Judge Dann held that testimony on a DNA match would be allowed "even in the absence of further statistical evidence."

Although Roland's client was eventually found guilty of all counts on May 16, 1991, his result, with limited resources in precluding what was in effect ruled unreliable evidence, is a victory. DNA evidence is in fact subject to attack and should be challenged by the defense, routinely. Steinle was also successful in Hale, through the use of a pretrial motion in limine, to keep out most of the photographs of the victim and all autopsy photographs. CJ ^

SIDE BAR:

The trend now is that most courts are finding that the gel electrophoresis technique for typing and comparing DNA has gathered sufficient support in the scientific community to receive judicial endorsement. However, several issues remain important to attack in DNA cases.

Whether the procedure used was properly conducted is one issue. For example, impurity of samples, insufficiency of sample amounts, testing controls and performance standards.

Another issue is whether the method used by the agency or firm conducting the test to calculate genetic probabilities of a match is generally accepted in the scientific community. This issue was successfully challenged in the Maricopa County cases of State v. Hale and State v. McComb mentioned in the above article. The issue typically involves the fact there are still questions about how alleles (pairs of genes located at the same position on chromosomes) used in testing behave in standard populations, and whether the data bases that are being used by the testing company or agency are appropriate. For example, no study of Cellmark's data base has been published. Hence, there are often questions about whether the data base is appropriate in general and specifically for the defendant.

Knowing Open Ends Avoids Loose Ends: When is a Felony Not a Felony?

by Brian C. Bond

Several issues arise concerning class 4 "opens" (possession of dangerous drugs) and the effects of the recent amendment to A.R.S. 13-3407(B) (effective September 5, 1989), which now authorizes the Court to legally allow a class 4 felony to remain "open" pending the outcome of probation. Related concerns include what happens to probation violators who were sentenced to a class 4 "open" prior to September 5, 1989, when their probation is revoked, and what effect an "open" sentence prior to September 5, 1989, has in terms of whether it can be alleged as a prior conviction for sentence enhancement for a new crime.

The basic questions are these:

(1) Can a defendant charged with PODD allegedly occurring prior to September 5, 1989, but not sentenced prior to that date, legally receive an "open" pending the outcome of probation?

(2) Where a defendant was sentenced to a class 4 "open" prior to September 5, 1989, and is now charged with a new offense, can the class 4 "open" conviction be used as a felony prior under A.R.S. 13-604(D) in the new case?

(3) Same as #2, except can the defendant be considered to be on "felony" probation under A.R.S. 13-604.02?

(4) What happens (or can happen) to a defendant sentenced to a class 4 "open" prior to September 5, 1989, who has now violated probation?

To answer the questions, a background of the "open" situation is helpful. You first have to go back to the enactment of the new criminal code in 1978. Prior to the 1978 code, "open-ended" offenses existed. (See former A.R.S. 13-1657.) Under the new code, effective October 1, 1978, the legislature adopted language which allowed "the trial court to . . . enter judgement of conviction for a class 1 misdemeanor at the time of sentencing" on certain class 6 felonies. (See former A.R.S. 13-702(H)). Pursuant to the previously existing status quo, courts continued to place people on probation, leaving the offenses "open" or "undesignated" pending the defendant's performance on probation.

Then along came State v. Sweet, 143 Ariz. 266, 693 P.2d 921 (1985), and State v. Wright, 131 Ariz. 578, 642 P.2d 23 (App. 1982), which held, essentially, it was unlawful under A.R.S. 13-702(H) for the trial court to fail to designate the offense either a felony or a misdemeanor at the original sentencing. The legislature, in response, amended A.R.S. 13-702(H), effective August 4, 1984, to allow the court to be able to postpone designation until the completion or termination of probation on those class 6 offenses under A.R.S. 13-702(H).

(cont. on pg. 4)

Wright, a direct appeal by the defendant, held simply that the trial court did not have the authority to leave an offense "undesignated" pending probation. The court vacated the conviction and sentence, and remanded to the trial court with directions to resentence the defendant and designate the matter either a felony or misdemeanor. Sweet is more involved, and its holding more germane to most situations. Mr. Sweet was on probation for an "undesignated" offense when he committed a new crime. The issue was whether he could be considered on "felony" probation under then A.R.S. 13-604.01 (now A.R.S. 13-604.02) for purposes of enhancement on the new case. The court, based on Wright, held he was not on "felony" probation when he committed the new crime, and the enhancement provisions of then A.R.S. 13-604.01 accordingly did not apply to the new offense.

After Sweet came State v. Fallon, 151 Ariz. 192, 726 P.2d 608 (1986), which held the August 3, 1984, amendment to A.R.S. 13-704(H) was not retroactive, and thus those sentenced to "opens" prior to August 3, 1984 were still not on "felony" probation after August 3, 1984, for purposes of A.R.S. 13-604.01, consistent with the holding in Sweet.

What does all this have to do with class 4 "opens"? Former A.R.S. 13-3407 allowed the trial court, like former A.R.S. 13-702(H), to "enter judgement of conviction for a class 1 misdemeanor at the time of sentencing," if the court felt it appropriate. After Wright and Sweet, the legislature amended A.R.S. 13-702(H) to allow a conviction to remain "open" pending the outcome of probation. A.R.S. 13-3407 was not amended, but everyone continued to act as if it had been. Hence, there are a significant number of individuals with unlawful class 4 "open" probations.

Enter State v. Welker, 155 Ariz. 554, 748 P.2d 783 (App. 1987). Based on an Anders brief filed by our own Steve Collins, Division Two decided to sua sponte raise the issue of whether class 4 offenses could remain "open" pending the outcome of probation. Finding A.R.S. 3407(B) had not been amended, the court held, using the Sweet rationale, class 4 offenses had to be designated at the original sentencing. (The legislature has now amended A.R.S. 13-3407(B) to allow class 4 "opens" pending the outcome of probation. The effective date of this amendment is September 5, 1989).

The latest case of interest in the "open" situations is State v. Watkins, 161 Ariz. 108, 776 P.2d 359 (App. 1989). Watkins, like Sweet and Fallon, involve a class 6 undesignated offense; however, after Welker, the analysis is now the same for class 4 and class 6 offenses (although the dates to remember are different -- the cut-off on a class 6 is August 3, 1984; the cut-off on a class 4 is September 5, 1989).

Mr. Watkins was convicted and sentenced to a class 6 "open" prior to August 3, 1984. He then committed a new crime. At sentencing on the new crime, the trial court revoked his probation on the 6 "open", designated it a felony, and used it as a prior felony conviction under A.R.S. 13-604(D) to enhance his sentence on the new crime. The court held this could not be done, stating:

"The underlying principle of Sweet and Fallon is that, prior to the 1984 amendment to A.R.S. 13-702(H), the trial court could not legally defer the designation of an open end offense pending the outcome of probation. Thus, the subsequent designation, as occurred in both Sweet and Fallon, was a nullity. It was this attempt to breathe felonious life into an improper sentence that is condemned in Sweet and Fallon, not which enhancement statute was being utilized.

Here, the trial court in the open end case improperly failed to designate the offense at the time of conviction. The attempt to cure this defect by subsequent designation has no more effect than it had in Sweet or Fallon .... In petitioner's case, his "conviction", under Sweet, a nonfelony, occurred back in September 1981, not when the trial court improperly made a "designation" in 1982."

Watkins, Supra, 161 Ariz. at 110, 776 P.2d at 361.

While the actual holding in Watkins concerns enhancement under A.R.S. 13-604(D), these two paragraphs just cited are extremely broad. They can fairly be read to mean anyone convicted and sentenced to an "open" prior to the effective dates of the amendments to A.R.S. 13-702(H) or A.R.S. 13-3407(B) is guilty of a "nonfelony", and subsequent designation as a felony is precluded. This issue, as will be discussed later in the answer to Question 4, is currently at issue before the Court of Appeals in a special action entitled Peterson v. Superior Court, 1 CA-SA 91-041. Jurisdiction was accepted by the Court in March.

Now, the answers to the questions.

(1) Can a defendant charged with PODD allegedly occurring prior to September 5, 1989, but not sentenced prior to that date, legally receive an "open" pending the outcome of probation?

Yes. In State v. Winton, 153 Ariz. 302, 736 P.2d 386 (App. 1987), the Court held the amendments authorizing "open" treatment pending the outcome of probation are procedural, not substantive, and accordingly one being originally sentenced after the effective date can legally receive "open" treatment.

(2) Where a defendant was sentenced to a class 4 "open" prior to September 5, 1989, and is now charged with a new offense, can the 4 "open" conviction be used as a felony prior under A.R.S. 13-604(D) in the new case?

No. Watkins is clear that subsequent designation as a "felony" cannot fix the previous "nonfelony" (or "open") sentence for purposes of A.R.S. 13-604(D). This also applies to any 6 "open" originally sentenced to an "open" prior to August 3, 1984, regardless of any subsequent designation.

(3) Same as #2, except can the defendant be considered to be on "felony" probation under A.R.S. 13-604.02?

No. Sweet and Fallon apply.

(4) What happens (or can happen) to a defendant sentenced to a class 4 "open" prior to September 5, 1989, who has now violated probation?

Good question, which should shortly be answered in Peterson v. Superior Court, 1 CA-SA 91-041. It seems to me Watkins says this defendant is guilty of a "nonfelony", which cannot now be made a felony. If you have such a case, make the argument (and the record) that the matter is a class 1 misdemeanor (since it cannot be made a felony), or, at worst, a "nonfelony". The only "nonfelony" I am aware of that is not a misdemeanor is a "petty offense". The judge in this situation has basically three options:

(cont. on pg. 5)

(1) Disregard your argument, designate it a felony and send your client to DOC. In this case, file an appeal;

(2) Designate it (or treat it as) a misdemeanor or petty offense, and sentence your client to whatever. In this case, keep quite; or

(3) Back your client out of his plea agreement based on the language in Welker. In this case, object to being backed out of your plea. If the judge indicates that if he lets your client stay with his plea, he then gets to designate it, and you have thus "waived" any Watkins argument by opting to stay with your plea, simply tell him "no", you are not intending to "waive" your Watkins argument, and do not want out of your plea, but he can go ahead and do whatever it is he thinks he has to do (but, of course, be nice about it).

If the judge backs you out of your plea over your objection, you have a double jeopardy argument (See, State v. Williams, 130 Ariz. 209, 635 P.2d 497 (1981); Lombrano v. Superior Court, 124 Ariz. 525, 606 P.2d 15 (1980)).

If it gets any more involved than this, call me. ^

MAY JURY TRIALS

April 29

Stephen A. Avilla: Client charged with child molestation. Trial before Jude O'Toole ended May 02. Defendant found not guilty. Prosecutor S. Evans.

April 30

Tamara D. Brooks: Client charged with armed robbery, dangerous, with 1 prior felony alleged. Trial before Judge Howe ended May 02. Defendant found not guilty of armed robbery and allegation of prior conviction. Defendant found guilty of lesser included theft. Prosecutor was L. Reckart.

Raymond Vaca: Client charged with theft, burglary and trafficking in stolen property. Trial before Judge Cole ended May 07. Defendant found not guilty of burglary, and guilty of theft and trafficking. Prosecutor was A. Massis.

May 01

Daniel B. Patterson: Client charged with attempted murder and third-degree burglary. Trial before Judge D'Angelo ended May 10. Defendant found guilty. Prosecutor was A. Fenzel.

Randy F. Saria, Sr.: Client charged with 5 counts of child molestation. Trial before Judge Dougherty ended May 20 with a hung jury (11 to 1 for acquittal on one count; 7 to 5 for acquittal on four counts). Prosecutor was B. Jorgensen.

Roland J. Steinle: Client charged with first-degree murder, second-degree burglary and sexual assault. Trial before Judge Dann ended May 16. Defendant found guilty of all charges. Prosecutor was V. Kirby.

May 02

Jeffrey L. Victor: Client charged with aggravated assault, resisting arrest and disorderly conduct. Trial before Judge Gerst ended May 06. Defendant found not guilty of aggravated assault and guilty of resisting arrest and disorderly conduct. Prosecutor was G. McCormick.

May 07

Elizabeth S. Langford: Client charged with aggravated DUI (suspended license). Trial before Judge Sheldon ended May 09. Defendant found not guilty of aggravated DUI and guilty of driving with suspended license. Prosecutor was N. Miller.

May 08

James J. Haas and Patricia L. Koch: Client charged with sexual assault and kidnapping. Trial before Judge Martin. Defendant found not guilty. Prosecutor was D. Winston.

May 09

Gerald A. Williams: Client charged with aggravated assault. Trial before Judge Campbell ended May 10. Defendant found not guilty. Prosecutor was L. Ruiz.

May 13

Michael Walz and Robert W. Doyle: Client charged with sale of narcotic drug. Trial before Judge Hall ended May 15. Defendant found not guilty. Prosecutor was L. Ruiz.

May 14

Rena P. Glitsos: Client charged with possession of marijuana for sale. Trial before Judge Hertzberg ended May 16. Defendant found guilty of lesser included charge, possession of marijuana (class 6 F). Prosecutor was M. Kemp.

Bruce F. Peterson: Client charged with armed robbery with two priors. Trial set before Judge O'Toole. On May 14 before start of trial, defendant pleaded guilty to armed robbery with one prior. Prosecutor was M. Carbone.

Anna M. Unterberger and William J. Kiernan: Client charged with aggravated assault with two priors while on probation. Trial before Judge Hendrix ended May 20. Defendant found guilty of simple assault, misdemeanor. Prosecutor was J. Hicks.

May 15

Elizabeth S. Langford: Client charged with endangerment, class 6 felony. Trial before Judge Ybarra ended May 21. Defendant found not guilty of felony endangerment and guilty of misdemeanor endangerment. Prosecutor was K. Mills. (cont. on pg. 6)

May 17

Slade A. Lawson: Client charged with second-degree burglary. Trial before Judge Grounds ended May 20. Defendant found not guilty. Prosecutor was D. Udall.

May 20

Donna L. Elm: Client charged with sale of narcotic drug. Trial before Judge Hall. Court entered a judgement of acquittal. Prosecutor was L. Krabbe.

May 22

Peter R. Claussen: Client charged with sale of marijuana. Trial before Judge Gottsfield ended May 24. Defendant found not guilty. Prosecutor was P. Crum.

William A. Peterson: Client charged with 3 counts of child molestation. Trial before Judge Martin. Court entered a judgement of acquittal on Count I. Defendant was found guilty on counts II and III. Prosecutor was S. Smith.

Stephen J. Whelihan: Client charged with criminal trespass. Trial before Judge O'Toole. Defendant found not guilty. Prosecutor was G. McCormick.

May 23

Todd K. Coolidge: Client charged with possession of dangerous drugs and possession of marijuana. Trial before Judge Hendrix ended May 30. Court entered a judgement of acquittal. Prosecutor was J. Martinez.

May 28

Grant R. Bashore: Client charged with sexual assault. Trial before Judge Gottsfield. Defendant found guilty. Prosecutor was A. Fenzel.

Christine M. Funckes: Client charged with theft and criminal damage. Trial before Judge Ryan ended May 30 with a hung jury. Prosecutor was M. Daiza.

Brent E. Graham: Client charged with theft and possession of stolen property. Trial before Judge Hotham. Defendant found guilty. Prosecutor was L. Ruiz.

Larry Grant: Client charged with 4 counts of child molestation. Trial before Judge Hall. Defendant found guilty on all counts. Prosecutor was D. Greer.

May 30

William L. Brotherton, Jr.: Client charged with attempted possession of narcotic drug. Trial before Judge Dann ended June 03. Defendant found guilty. Prosecutor was P. Hineman.

Robert F. Ellig: Client charged with sexual assault and kidnapping. Trial before Judge Dougherty ended June 06 with a hung jury. Prosecutor was Rodriguez.

ARIZONA ADVANCED REPORTER
Volume 85

Tracy v. Superior Court
85 Ariz. Adv. Rep. 20, April 23, 1991 (S.Ct.)

The Navajo nation may enact the Uniform Act to Secure the Attendance of Witnesses from without a state in criminal proceedings [A.R.S. 13-4091 et seq.] to compel witnesses to testify in tribal courts. Two judges dissent, finding that the Navajo nation is not a state or territory within the meaning of the Uniform Act.

State v. Buccini
85 Ariz. Adv. Rep. 3, April 18, 1991 (S.Ct.)

The police interview a suspect at his home. He cooperates and consents to a search. The defendant tells the police about his alibi and leaves for work. The police then seek a search warrant, but falsely imply there was no alibi and that defendant terminated the consent search. After an evidentiary hearing on the motion to suppress, the trial judge grants the motion. On the state's appeal, the Arizona Supreme Court holds that the defendant needed to show that the police knowingly, intentionally or with reckless disregard to the truth included a false statement in the affidavit and the false statement was necessary to the finding of probable cause, under Franks v. Delaware, 438 U.S. 154 (1978). On the first prong of the test, the evidence indicated that the police at least recklessly misstated material facts and the trial judge did not abuse her discretion. The court then considered de novo whether the redrafted search warrant affidavit was sufficient to establish probable cause. While the redrafted affidavit showed that defendant possessed property that might be connected with the crime, the affidavit also showed an explanation for his possession. While the evidence also suggested a potential motive, the affidavit also showed an alibi and no facts indicating the alibi to be untrue. While probable cause is a fluid concept that turns on the assessment of probabilities in particular factual context, policy considerations, militated in favor of resolving this probable cause determination in the defendant's favor. In dissent, Justice Corcoran notes that the alibi evidence is not strong and that some of the items seized were illegally possessed.

State v. Aguilar
85 Ariz. Adv. Rep. 47, April 25, 1991 (Div. 2)

Defendant was charged with kidnapping and attempted sexual assault. He claims he lacked intent due to a blackout caused by alcohol and cocaine use. Defendant's theory was supported by the testimony of a psychologist. A doctor on the jury told other jurors that his understanding of blackouts was different from the expert's testimony and explained that the type of episodes described in the testimony were not consistent with alcohol or cocaine blackouts.

(cont. on pg. 7)

The trial court denied defendant's motion to vacate the judgement based upon jury misconduct. Jurors may rely on their common sense and experience during deliberations. They are expected to bring into the courtroom their own knowledge to aid them. The doctor did not bring evidence into the jury room when he relied on his own experience and knowledge.

Volume 86

Day v. Superior Court
86 Ariz. Adv. Rep. 46, May 14, 1991, (Div. 1)

Defendant's counsel seeks to depose the victim who refuses an interview. The trial judge denies the motion for deposition and the defendant takes a special action. While portions of the Victims' Bill of Rights violate the separation of powers doctrine, Slayton v. Schumway, 166 Ariz. 87, (1990), the provision involving victim depositions is not flawed. Though the court's authority to order depositions under Rule 15.3 is now limited, it is not abrogated. This change is solely related to protecting rights created by the Victims' Bill of Rights and does not violate the separation of powers doctrine.

State v. Albrecht
86 Ariz. Adv. Rep. 50, May 16, 1991 (Div. 1)

DUI defendant alleges that the state could not satisfy the relation-back requirement of Desmond v. Superior Court, 161 Ariz. 522 (1989). Division One of the Court of Appeals first considers whether there was sufficient evidence on the old "A" charge. The defendant's failure to stop at a red light, his speeding, his poor performance on the field sobriety tests and his physical signs of impairment constituted substantial evidence to reinstate the jury verdict on the "A" charge. As to the "B" charge, there was some evidence under Desmond which an expert could use to relate the BAC back to the time of arrest. However, it was error to permit the criminalist to estimate the defendant's BAC based upon his field sobriety tests. The expert testified as to the probabilities by percentage that the defendant's BAC was over .10 based upon his field sobriety test results. The verdict on the "B" charge is vacated.

State v. Nichols
86 Ariz. Adv. Rep. 67, May 14, 1991 (Div. 2)

Defendant moved to dismiss his criminal DUI charges on double jeopardy grounds after his license was automatically suspended for 90 days pursuant to A.R.S. 28-694. The automatic suspension of a driver's license or the subsequent administrative hearing for that purpose are not prosecutions for double jeopardy purposes. Further, the 90-day license suspension is not punishment and does not bar criminal charges against the accused.

State v. Coker
86 Ariz. Adv. Rep. 63, May 19, 1991 (Div. 2)

Defendant is charged with fraud and defends on the basis that his evil twin deceived him. [Defendant really does have an identical twin brother.] Proof of the twin's deceit came from the testimony of the twin's girlfriend. The prosecution was allowed to produce evidence that the defendant had in the past identified himself to the police as his brother. This evidence was inadmissible character evidence. It was also irrelevant because the defendant did not testify. The evidence also did not prove defendant's knowledge of the fraud. Evidence that defendant had impersonated his brother did not make it less likely that his brother impersonated him.

State v. Daniel
86 Ariz. Adv. Rep. 59, May 7, 1991 (Div. 2)

The police find and search a car involved in an armed robbery. Evidence in the car implicates T. When T is interrogated, his confession implicates J and the defendant. T refuses to testify at the joint trial of J and the defendant. The state introduces T's confession at the joint trial. The defendant's right to confront the witnesses against him is not violated by the collateral inculpatory statement against the penal interests of an unavailable declarant if the statement bears indicia of reliability. Reliability is shown by proof of corroborating circumstances that clearly indicate the truthfulness of the statements. However, evidence corroborating the truthfulness of the statement is irrelevant and may not be considered in examining the indicia of reliability of an accusatory hearsay statement. Inherent trustworthiness alone must be used to establish reliability. Idaho v. Wright, 110 S.Ct. 3139, (1990). Even though T was speaking against his own penal interests, he may have been on drugs and had motives to lie. T's confession does not fall within a firmly rooted hearsay exception because implicating the defendant was not against T's penal interest.

Defendant also challenges the evidence seized in a search of the car. The car belonged to defendant's cousin who had reported the car stolen. Defendant intentionally abandoned the vehicle when he told his cousin to report it as stolen and had no standing to challenge the search.

State v. Everhart
86 Ariz. Adv. Rep. 64, May 14, 1991 (Div. 2)

Defendant pleads guilty to attempted child molestation, a dangerous crime against children in the second degree. Defendant is sentenced to the maximum term of 15 years in prison and is also ordered on lifetime probation. The court strikes the order of lifetime probation because A.R.S. 13-604.01 does not authorize probation on top of the imposition of a prison term for one offense. As probation is the suspension of sentence, a trial court may order that a convicted defendant be placed on probation in leu of imposing a prison term, but not in addition to a term of imprisonment.

(cont. on pg. 8)

The defendant has sexual encounters with a minor and, over a week later, kidnaps him. Appellant was convicted in federal court of kidnapping and in state court of child molestation. The sentences are to be served consecutively. Defendant claims that because these offenses involve the same victim, during a continual sequence of events and over a short period of time, consecutive sentences were impermissible under A.R.S. 13-116. There is not merit to the defendant's claim. The offenses occurred more than one week apart and the evidence necessary to support each charge is separate. The victim also suffered an additional risk of harm from the kidnapping beyond that inherent in the child molestation.

At his change of plea hearing, defendant was advised that probation was not available. Under A.R.S. 13-604.01, probation actually was available. However, the plea agreement expressly provided that probation was not available and defendant did not request that he be permitted to withdraw from his guilty plea.

Defendant also claims that the trial court erred in relying upon defendant's prior record and the severe emotional trauma to the victim as aggravating circumstances. Defendant's federal kidnapping conviction for events which took place more than one week after his state charge could properly serve as an aggravating factor. There was also sufficient evidence in the presentence report for the trial judge to conclude that the victim suffered severe emotional trauma. Appellant's sentence was also not excessive nor cruel and unusual punishment.

Defendant also claims the trial judge was biased against homosexuals and that he received ineffective assistance of counsel. Neither issue can be raised for the first time on appeal.

State v. Garcia
86 Ariz. Adv. Rep. 61, May 7, 1991 (Div. 2)

Police observe the defendants reaching over a fence and trying to take something from a private yard. Upon investigation, officers glanced inside the defendants' vehicle and noticed bullets lying on the front seat. The appellees were frisked for officer's safety and the vehicle searched. Two guns were found under the seats. After arrest, cocaine was found in one defendant's jacket. Both defendants are found in, and later admit to, possession of cocaine. The trial court grants a motion to suppress for lack of probable cause but this is reversed on appeal. Bullets strongly imply that guns are nearby. Defendants' suspicious activities coupled with bullets in the vehicle provide a basis for fear for the officer's safety. The order granting the motion to suppress is reversed.

State v. Hantman
86 Ariz. Adv. Rep. 71, May 16, 1991 (Div. 2)

Defendant was charged with DUI and with a civil traffic violation. He failed to appear for the civil citation and default judgement was entered. Defendant paid the fine before the state could get a motion to dismiss signed. Defendant moved to dismiss the remaining DUI charges on double jeopardy grounds. Under Taylor v. Sherrill, 166 Ariz. 359 (App. 1990). Division Two distinguishes Sherrill because it involved a subsequent prosecution. Defendant paying the fine resolved only one of the charges against him and the civil traffic citation was not for a lesser included offense. Defendant's fine for unsafe movement on a roadway did not bar DUI prosecution.

State v. Hicks
86 Ariz. Adv. Rep. 31, May 7, 1991 (Div. 1)

Defendant, charged with class 2 felony kidnapping, plead guilty to attempted kidnapping, a class 3 felony. Defendant files for post-conviction relief claiming that there is no class 3 felony of kidnapping under State v. McMillen, 154 Ariz. 322. McMillen holds that attempted kidnapping can only be a class 5 felony. However, attempted kidnapping can be a class 3 felony when the factual basis for the crime would support a conviction for class 2 felony kidnapping.

Defendant also claims the prosecutor withheld information concerning the victim's recantation. The record reveals that the defendant was well aware of the recantation evidence. The prosecution is not required to disclose exculpatory evidence already known to a defendant.

Defendant claims he received ineffective assistance of counsel for failure to call witnesses to impeach the victim's statement to the court. Defense counsel cross-examined the victim but called no witnesses to show that she had recanted. Because the trial judge found a large number of aggravating circumstances and only one possible mitigating circumstance, defendant failed to show a reasonable probability of a different result.

Defendant claims that the trial judge should have found his claim of self-defense as a mitigating factor and should have given him an evidentiary hearing. The court is not required to find mitigating factors, but only to consider them. Defendant also failed to show any abuse of discretion.

State v. Marquess
86 Ariz. Adv. Rep. 44, May 14, 1991 (Div. 1)

The state, unable to find a witness, moves to dismiss without prejudice. The trial judge grants dismissal without prejudice but requires the state to refile within 30 days or dismissal will be with prejudice. The state fails to refile, to appeal, or to seek review of the order. Months later, charges are refiled. The defendant moves to dismiss and dismissal is granted with prejudice. The Court of Appeals finds it has jurisdiction and that under Rule 16.5(d), a dismissal with prejudice can be presumed to be in the interests of justice, contrary to State ex rel Jenny v. Superior Court, 122 Ariz. 89 (App. 1979). The order dismissing the second indictment is affirmed.

(cont. on pg. 9)

State v. Padilla
86 Ariz. Adv. Rep. 15, May 2, 1991 (Div. 1)

Defendant, convicted of offering to sell narcotics, claims that A.R.S. 13-3408 is overbroad and unconstitutional because it makes protected speech a crime. The first amendment is not a defense to a criminal charge simply because words are used to carry out an illegal purpose. Offering to sell narcotics is also not a lesser included attempt of sale of narcotic because an offer to sell is a completed offense.

State v. Scroggins
86 Ariz. Adv. Rep. 19, May 2, 1991 (Div. 1)

Defendant pleads guilty to aggravated assault. He is ordered to pay restitution of not more than $2,000.00. There was no proof of any economic loss to the victim. The trial court has an affirmative duty to determine the amount of the economic loss. This determination should occur as a part of sentencing when the parties and the evidence are available and the defendant's obligations to society are being defined. The case was remanded for an evidentiary hearing to determine the amount of restitution.

Defendant was also ordered to pay a fine of $2,740.00 to the drug enforcement account. While she plead guilty to aggravated assault, two drug charges were dismissed. The distribution of the fine did not affect the defendant's obligation. The distribution of the fine is irrelevant to the determination of a knowing plea. ^

Arizona Advanced Reporter case summaries are written by Robert W. Doyle and prepared for use by Maricopa County Public Defenders.

TRAINING CALENDAR

July 7-14

Western Trial Advocacy Institute, Laramie, Wyoming

July 14-27

National Criminal Defense College Trial Practice Institute, Macon, Georgia

July 28-31

Adolescent Drug Sellers/Abusers, San Francisco, California

August 5-9

Short Course Criminal Defense Lawyers, Chicago, Illinois

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Maricopa County Public Defender's Office seminars being planned:

* Short Course on Immigration Consequences for our Clients

* Effects of Victims' Rights Legislation

* Motion Practice for Criminal Defense Lawyers ^

Trial Group Coordinators Add New Facet to Public Defender Training

The addition of trial group coordinators to the public defender's office has given a new dimension to the training program. The coordinators, Russ Born, Anita Rosenthal, Dennis Dairman and Mike Walz, perform some administrative duties; however, a substantial amount of their time is devoted to providing assistance and training activities for all lawyers in their trial groups.

The coordinators' work so far has been in the areas of offering advice and information, implementing the office's second-chair policy, helping attorneys work up cases for trial and acting as trial group supervisor when that supervisor is unavailable.

In the near future, however, the coordinators will be expanding their roles to produce monthly mini-training sessions at trial group meetings on such topics as identifications, severance and trying priors. Case reviews will also be done by coordinators to assist attorneys preparing for trial. These reviews will allow trial attorneys the opportunity to have experienced lawyers help tackle some of the problems before the trial date. Several useful forms have been developed by the coordinators to assist with this process.

Additionally, mock trials will be put on by the coordinators. The coordinators are planning various forms of mock-trial training sessions in which trial attorneys can participate. Coordinators will focus on particular aspects of trial practice, for example, Dennis Dairman will address cross-examination of arresting officers.

If you need assistance on a case, contact one of the coordinators.
CJ ^

PERSONNEL PROFILES

Philippa Lee came to our office as a secretary in Trial Group C on June 10th. Her background includes reception, secretarial and loan processing work at various financial establishments.

Four new office aides began summer employment at the start of June. Aric Adams and Randy Saria are assisting in Records and other needed areas. Frances Dairman is working in Group C and Marc Hertzberg is employed in administration. ^

Victims' Rights Update

Compromise legislation has been enacted by the Arizona State Legislature to implement the so-called victims' bill of rights. As this article was being prepared, the bill passed by the legislature was before the governor for his signature. The final bill is not believed to carry an emergency clause, hence its effective date should not be until ninety days after the legislature adjourns.

The compromise on the original House Bill 2412, was reached by an ad hoc group of lawmakers, judges, prosecutors, victims' rights advocates and Lawyer Michael Kimmer, representing criminal defense attorneys. Patti Noland, the original sponsor of the bill that passed the Arizona House of Representatives on a 55-1 vote in April, coordinated the compromise.

The new law, now to be cited as the "Victims' Rights Implementation Act", makes sweeping changes in virtually every phase of the criminal process. Our next issue will provide a more in-depth analysis of the new law, however, some of the key provisions:

* Creates a $25.00 assessment on each misdemeanor conviction to be used for victims' rights and to be administered by the Attorney General's Office.
* Creates a representative for incapacitated and minor victims who is empowered to exercise the victim's rights.
* Affords corporations, partnerships, associations and other legal entities certain limited "victims' rights".
* Provides mandatory notice to victims by law enforcement agencies of their "rights".
* Requires prosecutors, upon request, to notify victims of all important proceedings.
* Mandates that upon request prosecutors meet with victims to discuss the disposition of their case.
* Creates victim impact statements as part of presentence reports and allows victims expansive rights at sentencing, including the right to present evidence.
* Creates a "privilege" between crime victim advocates and victims subject to certain exceptions.
* Requires the court, during court proceedings, to minimize contact between the victim (including the victim's family and witnesses) and the defendant (including the defendant's immediate family and defense witnesses).
* Allows the victim to refuse to be interviewed and that all contact with the victim shall be through prosecutors.
* Creates certain privacy rights of victims, including keeping their residence and business addresses, telephone numbers and places of employment from being disclosed.
* Gives victims standing to bring special actions to enforce their rights and to recover damages from an individual or governmental agency responsible for the intentional or knowing violations of the victims' bill of rights. CJ ^

Let's Make a Deal

A criminal defense attorney recently submitted the following judicial "let's make a deal". The background is that the defendant, in federal court, was charged with five separate bank robberies in one indictment. The words are from the actual transcript. The names of the attorneys have been deleted.

THE COURT: All right, thank you, Mr. Defense Attorney.

DEFENSE: Thank you, Your Honor.

THE COURT: Mr. Prosecutor? You think these should all be tried together, Mr. Prosecutor?

PROSECUTION: I absolutely do, Your Honor.

THE COURT: You really believe that?

PROSECUTION: I certainly do.

THE COURT: I was thinking about making a deal with you.

PROSECUTION:Okay.

THE COURT: Are you familiar with 40 -- is it 42 United States Code, Section 1928?

PROSECUTION: I'm not. But I am sure you are going to make me aware of it.

THE COURT: It is a provision that says you can assess costs and attorney's fees against an attorney for unnecessarily prolonging a case or doing something that results in added cost.

And, what I was thinking about is perhaps trying them all together, going up on appeal, and then making you the guarantor, if we have to try them again.

PROSECUTION: What if the Appellate Courts uphold me, Judge?

THE COURT: You will be a scholar and I will rely on you more the next time. ^